REVERSE and REMAND and Opinion Filed February 1, 2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00639-CV

TORIANO MANDRELL KIRK, Appellant
V.
TANITA NASH ATKINS, Appellee

On Appeal from the County Court at Law No. 2
Dallas County, Texas
Trial Court Cause No. CC-19-06824-B

MEMORANDUM OPINION

Before Justices Nowell, Smith, and Miskel
Opinion by Justice Miskel

Appellant Toriano Mandrell Kirk appeals the denial of his motion to compel arbitration. We hold that the parties' agreement is valid, the arbitration clause is unambiguous, that it is capable of being harmonized with the rest of the contract, and that the dispute is within the scope of the arbitration agreement. We reverse and remand for the trial court to compel arbitration.

I. BACKGROUND

Appellee Tanita Nash Atkins sued Kirk and others[1] for breach of contract, fraudulent misrepresentation, and conversion. According to the petition, Kirk misled her about the financial condition of his company to induce her to invest in it. This investment was made pursuant to an investor agreement, which Atkins attached as an exhibit to her first amended petition. Atkins further alleged that Kirk breached the agreement by failing to share profits with her.

Kirk moved to compel arbitration. He noted that the agreement provided for two-tiered alternative dispute resolution (ADR). First, "[a]ny controversies or disputes arising out of or relating to this Agreement" were required to be submitted to mediation. If mediation were unsuccessful, "any outstanding issues" were to be submitted to binding arbitration under the rules of the American Arbitration Association. Kirk alleged the parties mediated as the agreement required, but they were unable to resolve their differences. So, Kirk sought arbitration.

At the hearing on the motion to compel, the trial court sua sponte asked whether the "Remedies" section created an ambiguity in the agreement. The court noted that the agreement's "Remedies" paragraph stated, "The parties shall have all remedies for breach of this Agreement available to them provided by law or equity." The trial court asked whether this clause conflicted with the requirement that the

[1]Atkins also sued Kirk's alleged business partner, Anthony Dansby, and their company, Kirk & Dansby Transport, LLC. However, only Kirk joined in the motion to compel arbitration that is the subject of this appeal, and out of all the defendants, only Kirk participates in this appeal.

case be submitted to arbitration. Although Atkins had not previously raised this issue, she agreed with the court, arguing that the remedies clause conflicted with the ADR provision, such that the agreement allowed either arbitration or litigation. Atkins adopted the position that this alleged conflict gave rise to an ambiguity that allowed her suit to proceed in the county court at law.

The trial court denied the motion to compel arbitration. This appeal followed. Kirk raises eleven issues on appeal, each of which represents a facet of a single point: that the trial court abused its discretion by denying his motion to compel arbitration under the Texas Arbitration Act (TAA).[2] We agree with that broader point.

II. LEGAL AUTHORITY

We review a trial court's order denying a motion to compel arbitration for an abuse of discretion. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). We defer to the trial court's determinations if they are supported by evidence but review its legal determinations de novo. *Id.* Whether the claims in dispute fall within the scope of a valid arbitration agreement is a question of law. *Id.* "However, when the facts relevant to the arbitration issue are not disputed, an appellate court is presented only with issues of law and reviews the trial court's order de novo." *In re Trammell*,

[2]In the trial court, both sides agreed that TAA governed this dispute, rather than the Federal Arbitration Act (FAA), and Kirk repeats that argument on appeal. Because no party has argued otherwise, and because "the issue of arbitrability is subject to a virtually identical analysis under either the FAA or the TAA," we decide this case under the TAA. *See Rodriguez v. Tex. Leaguer Brewing Co. L.L.C.*, 586 S.W.3d 423, 427 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (same approach).

246 S.W.3d 815, 820 (Tex. App.—Dallas 2008, no pet.) (combined appeal & orig. proceeding).

A party seeking to compel arbitration must establish that a valid arbitration agreement exists and that the claims asserted are within the scope of the agreement. *Seven Hills Commercial, LLC v. Mirabel Custom Homes, Inc.*, 442 S.W.3d 706, 715 (Tex. App.—Dallas 2014, pet. denied). Ordinary principles of contract law determine whether there is a valid agreement to arbitrate. *Tecore, Inc. v. AirWalk Commc'ns, Inc.*, 418 S.W.3d 374, 379 (Tex. App.—Dallas 2013, pet. denied).

To determine whether a party's claims are within the scope of an arbitration agreement, we focus on the factual allegations and not on the legal causes of action asserted. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 754 (Tex. 2001) (orig. proceeding). "Courts distinguish 'narrow' arbitration clauses that only require arbitration of disputes 'arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or 'are connected with' the contract." *AdvoCare GP, LLC v. Heath*, No. 05-16-00409-CV, 2017 WL 56402, at *4 (Tex. App.—Dallas Jan. 5, 2017, no pet.) (mem. op.) (cleaned up) (quoting *Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998)). Doubts regarding an agreement's scope are resolved in favor of arbitration because there is a presumption favoring agreements to arbitrate. *Ascendant Anesthesia PLLC v. Abazi*, 348 S.W.3d 454, 459 (Tex. App.—Dallas 2011, no pet.). "Such a presumption is particularly applicable where the clause is broad." *Id.*

When an agreement to arbitrate has been established, "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (cleaned up).

When construing a written contract, our primary concern is to ascertain the true intentions of the parties as expressed in the instrument. *Tecore*, 418 S.W.3d at 380. Words must be construed in the context in which they are used, and we will examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *In re Whataburger Rests. LLC*, 645 S.W.3d 188, 194–95 (Tex. 2022) (orig. proceeding). We read contracts from a utilitarian standpoint, bearing in mind the purposes sought to be served and avoiding unreasonable constructions when possible and proper. *Endeavor Energy Res., L.P. v. Energen Res. Corp.*, 615 S.W.3d 144, 148 (Tex. 2020). If a contract has a certain and definite meaning, the contract is unambiguous, and we will construe it as a matter of law and enforce it as written. *Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC*, 639 S.W.3d 682, 690 (Tex. 2022).

III. VALIDITY OF ARBITRATION AGREEMENT

In the trial court, Atkins did not dispute that the agreement constituted a valid contract, and she did not raise any contract defenses.[3] To the contrary, she attached the agreement to her pleadings, and it formed the basis of her suit.

IV. SCOPE OF ARBITRATION AGREEMENT

The relevant portion of the agreement reads as follows:

> *Alternative Dispute Resolution.* The parties will attempt to resolve any dispute arising out of or relating to this Agreement through friendly negotiations amongst the parties. If the matter is not resolved by negotiation, the parties will resolve the dispute using the below Alternative Dispute Resolution (ADR) procedure.
>
> Any controversies or disputes arising out of or relating to this Agreement will be submitted to mediation in accordance with any statutory rules of mediation. If mediation is not successful in resolving the entire dispute, any outstanding issues will be submitted to binding arbitration under the rules of the American Arbitration Association. The arbitrator's award will be final, and judgment may be entered upon it by any court having proper jurisdiction.

Kirk asserted that the parties mediated their disputes unsuccessfully, and Atkins has not contested that they complied with the requirement to mediate. The question before the court was whether the parties were obligated to submit any outstanding issues to binding arbitration.

The scope of the ADR provision included "[a]ny controversies or disputes arising out of or relating to this Agreement." Those controversies or disputes must

[3]Atkins did not file a brief, so we rely on the record from the trial court to establish the nature of her argument against arbitration. *See Harris Cnty. Hosp. Dist. v. Peavy*, No. 14-19-00953-CV, 2020 WL 6142887, at *3 n.5 (Tex. App.—Houston [14th Dist.] Oct. 20, 2020, no pet.) (mem. op.).

be submitted to mediation, and if not completely resolved, then to binding arbitration. The paragraph does not define a separate scope of issues for arbitration. Therefore, the scope of the arbitration agreement includes any controversies or disputes arising out of or relating to the agreement that are not resolved by mediation.

The claims pleaded in this suit are controversies or disputes arising out of or relating to the agreement. The first paragraph of factual allegations in the petition concerned the signing of the agreement, and the last section of the petition was the agreement itself, which Atkins attached as her sole pleading exhibit. The factual substance of each of Atkins's claims related to the agreement. Atkins first pleaded that Atkins fraudulently misrepresented his company's finances with a view towards inducing Atkins to sign the agreement. The petition next stated a claim for breach of contract due to Atkins's alleged failure to fulfill his obligations under the agreement. Finally, Atkins claimed conversion, and what was alleged to have been converted was the $24,000 that Atkins contributed pursuant to the agreement. The suit is made up of outstanding issues that arose from or related to the agreement. Atkins herself did not contest that the controversies in this case are of the kind described by the arbitration provision. Even if the trial court had "[d]oubts regarding an agreement's scope," the trial court was required to resolve those doubts in favor of arbitration. *See Ascendant Anesthesia*, 348 S.W.3d at 459. Pursuant to the ADR provision, those issues are within the scope of the arbitration agreement and subject to binding arbitration.

V. HARMONIZING AGREEMENT PROVISIONS

Atkins did not contest the validity or scope of the arbitration provision. Rather, she adopted a concern that the language of the agreement was internally inconsistent and ambiguous enough with respect to arbitration that it did not give rise to a binding commitment to arbitrate. The trial court and Atkins asserted that the agreement's remedies clause, which provided that "[t]he parties shall have all remedies for breach of this Agreement available to them provided by law or equity," created a fatal conflict with the ADR provisions and made trial equally available as a means of resolving the case. Based on the language of the agreement, we are not convinced that the parties intended to treat trial and arbitration as rival remedies.

Atkins's and the trial court's interpretation—that the parties expressly agreed to submit any controversies or disputes arising out of or relating to their agreement to final and binding arbitration, only to provide a few pages later that they were not bound after all—would serve little purpose except to render the ADR provisions meaningless. Courts must examine the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *See Whataburger Rests.*, 645 S.W.3d at 194–95.

In this case, it is possible to harmonize and give effect to both provisions of the agreement. The ADR paragraph, in which the arbitration clause is found, controls the process of resolving disputes between the parties, while the remedies

paragraph describes the substantive relief that may flow from decisions on those controversies.

A remedy is the legal or equitable relief itself. *See Remedy*, Black's Law Dictionary (11th ed. 2019). "A remedy is anything a court can do for a litigant who has been wronged or is about to be wronged." Douglas Laycock, Modern American Remedies 1 (4th ed. 2010). "Remedies are substantive . . . ." *Id.* Immediately after the remedies paragraph, the parties' agreement discussed the availability of "all remedies," it provided that "the parties shall be entitled to obtain specific performance . . . and immediate injunctive relief," and it precluded the parties from arguing that these equitable remedies were barred by "an adequate remedy at law." Thus, if the context that surrounds the phrase "all remedies" is any indication, *see Whataburger Rests.*, 645 S.W.3d at 194–95, then the parties did not intend for this phrase to refer to the sort of factfinder who would resolve the case, but to what sorts of relief that factfinder could award, *see S. Green Builders, LP v. Cleveland*, 558 S.W.3d 251, 256–57 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (concluding that arbitration was required despite even stronger language concerning the availability of remedies); *see also Skidmore Energy, Inc. v. Maxus (U.S.) Expl. Co.*, 345 S.W.3d 672, 687 & n.12 (Tex. App.—Dallas 2011, pet. denied).

VI. CONCLUSION

The arbitration provision itself is unambiguous, and Kirk's interpretation would better harmonize and give effect to all of the agreement's provisions. The

parties' agreement validly and unambiguously required arbitration of the claims at issue. We therefore sustain Kirk's issues, reverse the order denying the motion to compel arbitration, and remand the case to the trial court for further proceedings consistent with this opinion.

/Emily Miskel/
EMILY MISKEL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TORIANO MANDRELL KIRK, Appellant No. 05-21-00639-CV V. TANITA NASH ATKINS, Appellee	On Appeal from the County Court at Law No. 2, Dallas County, Texas Trial Court Cause No. CC-19-06824-B. Opinion delivered by Justice Miskel. Justices Nowell and Smith participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant TORIANO MANDRELL KIRK recover his costs of this appeal from appellee TANITA NASH ATKINS.

Judgment entered this 1st day of February 2023.